No. 7771

United States
Circuit Court of Appeals
For the Ninth Circuit

THE NORTHERN PACIFIC TERMINAL COMPANY, a corporation,

Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a corporation,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon

Reply Brief of Appellant

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We deem it desirable that a few matters contended for in appellee's brief should be called to the court's attention.

On pages 10 and 11 it is stated that the Terminal Company's chief contention seems to be that the shipments, when made, were to go to the fuel oil spur of the Terminal and were not to stop at the interchange track, and counsel calls attention to one of the several cases referred to by appellant in its opening brief to the effect that the essential character of the shipments and not mere accidents of billing, determine the nature

of the shipment. Counsel refers to the fact that this was the rule applied by the Supreme Court "in distinguishing between interstate and intrastate transportation."

This same rule is relied upon, and followed, however by the Interstate Commerce Commission in determining the rates and divisions as between carriers with reference to company fuel. In "Rates on Railroad Fuel and other Coal", 36 I. C. C. at page 8, the Interstate Commerce Commission says:

> "It is well settled that the character and nature of the movement of the traffic, that is, whether the movement is a through or local movement and not the mere accidents of billing, determine the nature of the commerce and the rate applicable." (Quoting numerous authorities.)

The Commission further says:

> "Clearly the fuel coal here considered was at no time actually destined to the billed destinations such as Roebuck, Ellenboro, and Ridgeland, but was in fact destined to and intended for use at various points of consumption to which it was reconsigned and transported. * * * It follows that the joint through rates and divisions of the joint through rates applicable to the various points of *actual destination* were the proper rates and divisions to be applied." (Italics ours.)

All of the shipments in this case moving from the inception of the traffic to January 6, 1930, originated at the Standard Oil Company's plant in the territory within the City of Portland designated as Willbridge. The contract of purchase of the oil by the Terminal Company from the Standard Oil Company provided that it

was sold F. O. B. fuel oil spur, Guilds Lake, Portland, within switching Zone 5. (Tr. 96.) This fuel oil spur is within "Guilds Lake." That was the point to which the shipments were all destined, and the point to which they were actually transported. The Terminal Company had no proprietary interest in the oil until the shipments reached that point. Upon receiving the shipments from the Standard Oil Company the appellee collected the full charges from the Standard Oil Company, and the Standard Oil Company paid the S. P. & S. Railway Company full tariff charges to that point. For any failure of the S. P. & S. Railway Company to deliver at that point it would be liable to the Standard Oil Company for such failure. Furthermore the Standard Oil Company until said shipments did reach said point had the right of stoppage in transit or could divert said shipments to some other point. The Bill of Lading was sufficient to require delivery at the oil spur for the oil spur is as much within Guilds Lake as the interchange track and as pointed out in our opening brief the S. P. & S. Railway Company had full knowledge of the actual destination thereof, as shown by Mr. Pickard's letter to Carey & Kerr, of November 24, 1926, wherein he states:

> "I would like your ruling on this for the reason that there are other movements of the same character involved, such as fuel oil * * * from Willbridge to the N. P. Terminal *storage tanks in Guilds Lake.*"

So that under the application of this ruling by the Interstate Commerce Commission the actual destination of the shipments, the point to which they were

actually moved, determines the character of the shipments, "the proper rates and divisions to be applied."

It is contended (Appellee's Brief, pg. 33) that the Terminal Company could have directed the Standard Oil Company to designate the particular track in Guilds Lake to which said shipments were to be delivered, in which event there would be no question of the right of the Terminal Company to participate in the revenue. The fact is the Terminal Company was not a party to the bill of lading and, as far as the record shows, and we believe in fact, the Terminal Company never saw a single bill of lading, or knew that such was in existence until after this action was commenced. There is no question that if the objection of the S. P. & S. was made on the basis of any insufficiency of the bills of lading the same could and would have been corrected but no such point was ever made until plans were being laid by the S. P. & S. to commence action against the Terminal Company, but the S. P. & S. was in fact, at all times, advised by the Terminal Company as to the track within Guilds Lake where said shipments were being made. It was a party to the bill of lading. The shipments were moving practically daily and it could and should, if it deemed the billing of so much importance, have seen to the correction of the same for it was fully advised of the actual destination of the shipments. Why should it therefore be necessary on the part of the Terminal Company to instruct the consignor when the bills of lading were those of the railway company which had been instructed in regard to this matter? This would seem to be an idle requirement

with this knowledge and direction in the possession of the railway company.

> "It is the duty of a common carrier to issue a bill of lading free from ambiguity or uncertainty." Gill-Andrew Lumber Co. v. Director General, 57 I. C. C. 493, 4.

ACQUIESCENCE OF THE TERMINAL COMPANY

Counsel for appellee lays considerable stress upon the claimed fact that the appellant acquiesced in the S. P. & S. interpretation of the billing. With this we take issue. There was no acquiescence for in every letter that was written on the subject it appears the Terminal Company was maintaining its position that it was performing a common carrier service in connection with the shipments. At the same time the letters of the S. P. & S. at no time claimed any insufficiency of the bills of lading to permit delivery at the oil spur. In fact their whole correspondence recognized the fact that such shipments were being transported to the oil spur in Guilds Lake. How can the Terminal Company be charged with acquiescence when the correspondence of the S. P. & S. disclosed no claimed insufficiency in the billing?

Ordinarily the railroads are able to compose their differences without legal proceedings and the only basis upon which such acquiescence could be claimed was that the Terminal Company did not actually commence action to recover its portion of the charges for on each and every occasion shown by the record the Terminal Company was asserting its right to the revenue. As

far as the shipments up to January 6, 1930, are concerned, being prepaid, the money was collected by the S. P. & S. from the Standard Oil Company. It got this money into its treasury and refused to pay any portion of the same to the Terminal Company although the Terminal Company was insisting at all times that it was entitled to a portion thereof. When, however, the Terminal Company started to secure its supply of fuel oil from the Richfield Company the oil was sold f. o. b. the Richfield plant in which case the Terminal Company paid the transportation charge. The money for the transportation of these shipments was in the Terminal Company's treasury, and, in line with the assertion of its rights, it paid to the S. P. & S. only the latter's share of the switching charge. The testimony of J. A. Johnsrud, Chief Clerk of traffic accounts is illuminating (Tr. 83-84), it is as follows:

> "On all shipments at [that] originated from the Richfield Oil Company, which shipments commenced on January 6, 1930, the Terminal Company paid the freight and was allowed to retain fifty per cent of the switching charge.
>
> On the shipments from the Standard Oil Company, which were prepaid, the S. P. & S. agent collected the money, the *S. P. & S. had the money and refused to give any of it to the Terminal Company.*
>
> On shipments from the Richfield Oil Company the shipments were not prepaid, the Terminal Company paid the freight *and retained one-half the charge.*" (Italics ours.)

In other words each company in maintaining its position with reference to this controversy when it got

the freight money into its pocket refused to pay or account to the other for any part thereof, except upon the basis which the one collecting the money maintained was the proper basis of the division of the revenue. The discussion therefore in appellee's brief as to the S. P. & S. after January, 1930, paying the Terminal Company a portion of the revenue, through misconstruction of its counsel's ruling, is hardly the fact. Each company which had the money in its pocket was holding it in reliance upon its interpretation of its rights. If this be acquiescence, and if acquiescence is to determine the interpretation of the parties' rights, then, from January 6, 1930, to commencement of this action, on September 20, 1933, the S. P. & S. acquiesced in the Terminal Company's position by the same token that the Terminal Company acquiesced in the S. P. & S. interpretation prior thereto, for it did no more during that period than the Terminal Company did in the prior period, assert by letter and bill, its right to the revenue. We do not think, however, that this was acquiescence on the part of Terminal Company. The S. P. & S. Company's acquiescence in the Terminal Company's contention was complete for it specifically acquiesced in writing. (Letter of April 13, 1930, from Robert Crosbie, Comptroller of the S. P. & S. to C. B. Shibell, Comptroller, The Northern Pacific Terminal Company, Tr. 101-2), and paid the Terminal Company for a three-year period with full knowledge of the claim and the basis of the claim of the Terminal Company.

We respectfully submit that the record in this case shows that the shipments in question were in fact ship-

ments from originating point to the oil spur in Guilds Lake, were actually transported to said point, and were intended, and known to be intended for that destination at all times, and by all parties, and that actual destination determines the true character of the shipments, and that the Terminal Company is entitled to its divisions upon that character of shipment.

Respectfully submitted,

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